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Order 2001-3-10



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 12th day of March, 2001

Served: March 12, 2001

**2001 HONG KONG FIFTH-FREEDOM ALL-
CARGO FREQUENCIES**

Docket OST-95-764

ORDER INSTITUTING PROCEEDING

SUMMARY

By this order, we institute the *2001 Hong Kong Fifth-Freedom All-Cargo Frequencies* case to select a carrier or carriers to operate three weekly fifth-freedom all-cargo frequencies under the U.S.-Hong Kong agreement.

BACKGROUND

Under the 1995 U.S.-Hong Kong Memorandum of Understanding, U.S. carriers may operate no more than eight weekly all-cargo frequencies with local fifth-freedom traffic rights for services between Hong Kong and a total of two third-country points chosen by the United States in conjunction with their U.S.-Hong Kong services. These two points may be in the Philippines, Thailand, and/or South Korea, with no more than five weekly frequencies allocated to any one point.¹ By Order 96-8-35, the Department allocated five weekly frequencies to Federal Express Corporation to serve the Hong-Kong-Subic Bay market and three weekly frequencies to Air Micronesia to serve the Hong Kong-Manila market.² In connection with the Department's frequency allocations, the United States selected Subic Bay and Manila, Philippines, as the two third-country points. The awards to Federal Express and Air Micronesia were subject to the Department's standard 90-day dormancy condition, whereby unused frequencies would revert automatically to the Department for reallocation in the event a carrier ceased to use the frequencies for a period of 90 days. Air Micronesia ceased operating its three frequencies in the

¹One of the eight frequencies may be converted into two weekly flights to be operated by aircraft with a capacity of fewer than 50 tonnes (55.1 U.S. tons) if operated in conjunction with a U.S.-Hong Kong service where the U.S. gateway point is not in the continental United States.

²Since Air Micronesia proposed Boeing 727 service with a capacity of fewer than 50 tonnes (55.1 U.S. tons) from Guam, its allocation of three frequencies was converted to four under the terms of the MOU.

Hong Kong-Manila market.³ Thus, the Department may allocate these three frequencies for Hong Kong fifth-freedom services at Manila, or a different third-country point.⁴

SUMMARY OF APPLICATIONS AND RESPONSIVE PLEADINGS

On November 29, 2000, United Parcel Service (UPS) filed an application, in Docket-95-764, for allocation of three weekly frequencies to operate fifth-freedom all-cargo service to and from Hong Kong. Evergreen International Airlines, Polar Air Cargo, Gemini Air Cargo, Northwest Airlines, and Federal Express Corporation subsequently filed their own applications for some or all of the available frequencies. By Notice dated January 19, 2001, we requested applications from all other U.S. carriers interested in using the available fifth-freedom traffic rights.

No new applications were filed in response to our final call for applications in this case. UPS, Evergreen, Gemini, Northwest, and Federal Express filed amended or supplemental applications. Polar, Gemini, Northwest, Evergreen, Air Micronesia, and Federal Express filed responsive pleadings.

See Exhibit A for a summary of the applications filed.

Each of the applicant carriers opposes the other applications to the extent that the other applications would preclude approval of its own proposal, and each has requested the Department to institute a comparative show-cause selection proceeding to allocate the available frequencies. They disagree, however, on the evidentiary requirements and procedural schedule that should be established.

UPS urges the Department to institute a proceeding providing for information responses, direct exhibits, rebuttals, and briefs with a procedural schedule lasting a total of 120 days. UPS also requests that the information responses include detailed Asian schedules (intra-Asia and trans-Pacific) operated by week for the last two calendar years by each of the applicants, as well as historical fifth-freedom traffic data to be provided by Federal Express and Air Micronesia.

Evergreen urges the Department to provide for an expedited procedural schedule that would allow 90 days for further applications, answers, and replies.

Polar disagrees with both UPS and Evergreen, arguing that the Department should institute a proceeding with an expedited schedule following the same procedural parameters outlined in the 1996 Hong Kong fifth-freedom all-cargo frequencies case in this docket.⁵ Polar states that an expedited procedural schedule totaling 42 days would enable the Department to allocate the three dormant frequencies at the earliest possible date consistent with the interests of administrative efficiency. It does suggest, however, that the evidentiary requirements contained in the 1996

³See Notice dated January 19, 2001, in this Docket.

⁴Under the terms of the MOU, third-country points selected by the United States may be changed with not less than 90 days notice to the Hong Kong aeronautical authorities.

⁵See Order 96-2-14.

Hong Kong case be supplemented to include information concerning (1) cooperative arrangements currently undertaken and anticipated by the applicants in each of the third/fourth and fifth-freedom markets at issue; (2) if cooperative arrangements are involved, the percentage of total capacity presently sold in each such market by the applicant; and (3) the percentage of total capacity to be sold in each such market by the applicant upon receipt of the frequencies at issue in this case. Polar argues that the request of UPS for a prolonged procedural schedule and detailed evidentiary requirements would create unnecessary delay and generate irrelevant data. Similarly, Polar contends that Evergreen's request for a 90-day schedule is excessive.

Northwest also requests that the Department establish streamlined evidentiary requirements and an expedited procedural schedule, and that applicants submit such additional information as the Department may require. Northwest maintains that streamlined procedures, with further applications, answers, and replies, rather than directs, rebuttals, and briefs, as proposed by UPS, would be appropriate in this case. If the Department requires the submission of traffic data and forecasts, then Northwest argues that the Department could direct existing applicants to submit traffic forecasts and direct incumbent carriers to provide historical traffic data.

Federal Express argues that the Department should allow adequate time for the applicants to develop evidence and argue their cases. Federal Express opposes the request of UPS for evidentiary data that is, according to Federal Express, some of the most commercially sensitive data that exists. Federal Express argues that UPS has not provided any justification for its evidentiary request and that Federal Express cannot provide some of the data requested, or would find it unreasonably burdensome to do so.

Air Micronesia states that it does not have the evidentiary information requested by UPS and that it would be unable to provide such information should it be requested to do so.

Gemini requests that the Department move to award the three available frequencies as expeditiously as possible and states that Gemini is prepared to provide whatever additional information that the Department may require.

DECISION

We have decided to institute the *2001 Hong Kong Fifth-Freedom All-Cargo Frequencies* case to select a carrier or carriers to operate the three weekly Hong Kong fifth-freedom frequencies that are currently available.

The subject fifth-freedom all-cargo traffic rights constitute valuable service opportunities in conjunction with service in the U.S.-Hong Kong market. Six U.S. carriers have applied to use these limited opportunities, seeking a greater number of frequencies than are available. In these circumstances, we believe that the public interest is best served by instituting a comparative proceeding to determine how these frequencies should be allocated.

As we have already solicited applications from U.S. carriers interested in allocation of these frequencies, we will not solicit further applications to use the available frequencies.

In allocating the available frequencies, our principal objective will be to maximize the public benefits that will result from award of the authority in this case. In this regard, we will consider which applicants will be most likely to offer and maintain the best service for the shipping public. We will also consider the effects of the applicants' service proposals on the overall competitive environment, including the market structure and the level of competition in the U.S.-Asia market, and on any other market shown to be relevant, and also including, where relevant, the positive effect on each applicant's operations in Asia. In addition, we will consider other factors historically used for carrier selection where they are relevant.

We will not place at issue the selection of backup carriers for these frequencies. We caution carriers, however, that frequencies may not be held indefinitely if not used.⁶ Consistent with our current practice, the frequencies allocated in this proceeding will be for an indefinite term, provided that the carrier continues to hold the underlying economic authority for the specific markets authorized. The frequencies to be awarded will also be subject to our standard 90-day dormancy condition, whereby the frequencies will be deemed dormant if they are not operated for 90 days in the market authorized, except where service in the market is seasonal. In all such instances of seasonal service, however, a carrier must notify the Department that its operations are of a seasonal nature; otherwise, the dormancy condition will apply. Under the dormancy condition if flights allocated are not used for 90 days, the frequencies expire automatically, and the frequencies revert to the Department for reallocation so that they can be available for other carriers immediately.

PROCEDURES AND EVIDENCE

We believe that written, non-oral show-cause procedures under Rules 207 and 210 of our regulations (14 CFR 302.207 and 302.210) are appropriate and that by using these procedures we can establish a complete evidentiary record and make a selection with the least possible delay and without unnecessary costs to the applicants. We find no material issues of fact that would warrant an oral evidentiary hearing in this case, and we note that none of the six carriers that have sought the frequencies has requested oral, evidentiary procedures. We are confident that the issues in this case can be addressed adequately on a written record.

We have appended to this order an evidence request for the benefit of the parties to this case.

This evidence request generally follows the evidence request used in the last Hong Kong fifth-freedom cargo case.⁷ Those evidentiary submissions proved useful in developing a complete record in the last proceeding, and we believe that they similarly will be beneficial to us in making a determination in this proceeding as well. We have supplemented the evidentiary request to include two additional submissions as requested by UPS and Polar. First, as requested by UPS,

⁶See, e.g., Order 2000-9-14, *U.S.-Brazil All-Cargo Frequencies & Designation* (Docket OST-2000-7559).

⁷Order 96-2-14. The last case also requested information regarding the availability of aircraft for the proposed services. Our January 19 Notice requested that information from all applicants. As this information is already on the record in this case, we have not requested that applicant carriers refile that information.

we will require all applicants to provide detailed schedules of their transpacific and intra-Asia services. Second, we will require applicant carriers to submit information about their current and proposed code-share operations in conjunction with their Hong Kong services, as suggested by Polar. We find both requests to be reasonable and believe that they will provide information useful in developing a complete record in this case. We note that no party opposed these requests.

We will not adopt the request of UPS that we require detailed historical traffic data from the two carriers that have operated Hong Kong fifth-freedom all-cargo services. UPS has not provided persuasive justification to require this data in this case. We believe that there are adequate data sources available that will enable carriers to develop their traffic forecasts in this case, and that will enable us to review those forecasts, without requiring the additional data sought. We are thus not persuaded in the circumstances presented that requiring the data requested is necessary or warranted in this case.

We emphasize that the evidence request includes specific instructions regarding the type and format of the information to be submitted and, in some instances, the sources of information to be used. We view adherence to these directives as critical to our consideration of the proposals in carrier selection cases. We put all applicants in this case on notice that we expect full compliance with the evidence request appended in this order. Any carrier not complying in any material respect with our request will be subject to elimination from consideration for an award in this case.

In addition to the material requested, applicants and any other parties may submit any additional information that they believe will be useful to us in reaching a decision.

PROCEDURAL TIMETABLE

In view of our desire for a timely decision in this case, we intend to conduct the proceeding instituted here according to the following schedule:⁸

Petitions for Reconsideration:	March 19, 2001
Direct Exhibits:	April 2, 2001
Rebuttal Exhibits:	April 16, 2001
Briefs:	April 30, 2001

In this regard, we note that rights at issue are available now and several of the applicants have expressed interest in using them promptly. Although some carriers have requested a somewhat longer or shorter procedural schedule and Federal Express has proposed requiring Reply Briefs, we believe that the schedule provided affords all applicants ample opportunity to prosecute their applications, properly balances the interests of all parties to the case, and will enable the Department to make a timely decision awarding the frequencies.

⁸The original filing should be on 8½" x 11" white paper using dark ink (not green) and be unbound without tabs, which will expedite use of our docket imaging system.

All dates are delivery dates and all submissions must be filed in the docket assigned to this proceeding. An original and five copies of all submissions are to be received by the Department of Transportation Dockets no later than the dates indicated. In the alternative, filers are encouraged to use the electronic submission capability through the Dockets DMS Internet site (<http://dms.dot.gov>) by following the instructions at the web site. For the convenience of the parties, service by facsimile is authorized. Parties should include their fax numbers on their submissions and should indicate on their certificates of service the methods of service used.

ACCORDINGLY,

1. We institute the *2001 Hong Kong Fifth-Freedom All-Cargo Frequencies* case, Docket OST-95-764, to be decided by non-oral, show-cause procedures under Rules 207 and 210 of our regulations (14 CFR 302.207 and 302.210);
2. The proceeding instituted in ordering paragraph one will consider which carrier(s) should be granted the available Hong Kong fifth-freedom cargo frequencies and (as necessary) underlying exemption authority, and what terms, conditions, and limitations, if any, should be imposed on any authority awarded in this proceeding;
3. We grant all motions for leave to file otherwise unauthorized documents; and
4. We will serve this order on United Parcel Service Co.; Evergreen International Airlines, Inc.; Polar Air Cargo, Inc.; Northwest Airlines, Inc.; Gemini Air Cargo, Inc.; Federal Express Corporation; the Hong Kong Economic and Trade Office in Washington, DC; the U.S. Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration.

By:

SUSAN McDERMOTT
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:
http://dms.dot.gov/reports/report_aviation.asp*

HONG KONG FIFTH-FREEDOM ALL CARGO FREQUENCIES

Carrier	Frequencies Requested	Routings As Stated in Application	Aircraft	Startup Date
Evergreen	3	San Francisco-Anchorage-Seoul-Hong Kong and reverse routing (two frequencies) and New York (JFK)-Columbus-Anchorage-Seoul-Hong Kong and reverse routing (one frequency)	B-747	No later than 30 to 60 days after award
Federal Express	1	U.S.-Hong Kong-Manila and beyond to other unspecified points ¹	MD-11	30 days from award
Gemini	3	Eastbound: Los Angeles-New York-Brussels-Abu Dhabi-Delhi-Bangkok-Hong Kong-Guam-Honolulu-Los Angeles ²	DC-10-30F or MD-11F	90 days from receipt of award
Northwest	3	Anchorage-Seoul-Hong Kong and reverse routing ³	B-747	Within 90 days of award
Polar	3	New York (JFK)-Chicago-Anchorage-Seoul-Hong Kong and reverse routing	B-747F	Immediately upon award
United Parcel Service	3	Hong Kong-Manila ⁴	B-757 and B-767	Upon receipt of award

¹Federal Express states that Anchorage will be the last traffic point in the United States.

² Gemini states that within 4 to 6 months of inauguration of service eastbound it will begin operation on same route westbound, originating and terminating in Los Angeles.

³Northwest service to and from Anchorage will connect with Northwest cargo service to and from New York (JFK), Chicago, Los Angeles, and San Francisco.

⁴UPS states that Anchorage would be the last traffic point in the United States.

EVIDENCE REQUEST

In responding to this evidence request, all parties are advised to heed the admonitions and notice regarding compliance contained in the attached order. The base year for developing forecast data should be the 12-month period ending June 30, 2000. Submission of the following evidentiary information should be for the forecast year ending June 30, 2002:¹

- Proposed schedules showing startup dates, complete routings (including all intermediate points) from origin to destination of all single-plane service that would operate in the fifth-freedom Hong Kong markets, days scheduled, equipment types, available capacity for the through routing, and variation of frequencies/routings by traffic season, if applicable.
- Historical schedules with complete routings from origin to destination for all U.S.-Asia and intra-Asia services over the two-year period ending December 31, 2000, including days scheduled, equipment types, available capacity for the through routing, and variation of frequencies/routings by traffic season, if applicable.
- A cargo traffic forecast for each fifth-freedom Hong Kong market proposed to be served based on the intended schedules. Such forecast should also specify the amount of traffic originating in or destined for the United States that will also be transported on the proposed single-plane flights permitting the Department to determine by direction the amount of cargo forecasted for each single-plane market, including U.S.-Hong Kong, U.S.-third-country, third-country to third-country, and Hong Kong fifth-freedom traffic on all proposed flights. The traffic forecasts must clearly provide the source and basis for the traffic projections.
- A statement specifying whether the carrier would accept partial grant of its frequency allocation application, how such allocation would be used, and the start-up for such services if different than above. Also state whether there is a minimum number of frequencies that the carrier will accept.
- A description of cooperative arrangements currently undertaken and anticipated by the applicants in each of the third/fourth and fifth-freedom markets at issue.
- If cooperative arrangements are involved, state the percentage of total capacity presently sold in each such market by the applicant; and state the percentage of total capacity to be sold in each such market by the applicant upon receipt of the frequencies at issue in this case.

¹ All financial data and responsive information must be given in U.S. dollars and all weights must be in U.S. pounds.